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No. 89-1799

In The

Supreme Court of the United States

October Term, 1989

JEFFREY M. MASSON,

Petitioner,

vs.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC., and JANET MALCOLM,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether, and to what extent, the First Amendment protects the publication of deliberately altered or manufactured quotations that are attributed to and defame a public figure.

2. Whether a Court may resolve factual disputes against a public figure in granting a motion for summary judgment made by defendants in a defamation action.

3. Whether there is an "incremental harm" doctrine that would render nonactionable a deliberately fabricated quotation attributed to a public figure which defamed him, because the public figure's actual remarks were provocative or bombastic.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals dated August 4, 1989, and amended February 15, 1990, is reported at 895 F.2d 1535, and appears in Appendix A to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Northern District of California, Eugene F. Lynch, District Judge, Presiding, dated August 17, 1987, is reported at 686 F.Supp. 1396, and appears in Appendix B to the Petition for Writ of Certiorari, an earlier opinion of Judge Lynch, dated August 19, 1986, appears in Appendix C to the Petition for Writ of Certiorari. The order of the Ninth Circuit denying a petition for rehearing, dated February 15, 1990, appears in Appendix D to the Petition for Writ of Certiorari.

JURISDICTION

The judgment and opinion of the Ninth Circuit Court of Appeals were entered and filed on August 4, 1989. On August 18, 1989, petitioner timely filed a Petition for Rehearing And Suggestion of Appropriateness of Rehearing En Banc, which was denied by order filed February 15, 1990. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

1. Introduction

After conducting extensive, tape-recorded interviews with petitioner Jeffrey M. Masson, respondent Janet Malcolm wrote an article for national publication containing quotations which she attributed to Masson. Alleging that many of the purported quotes were defamatory fabrications, Masson brought this suit for libel against Malcolm and her publishers, respondents The New Yorker Magazine, Inc. and Alfred A. Knopf, Inc. The Ninth Circuit has now affirmed a summary judgment against Masson, holding he could not prove that respondents published the article with knowing or reckless falsity even if they deliberately altered Masson's actual remarks.

2. Masson's Termination From The Archives

From 1975 to 1980, Masson was a full professor of Sanskrit & Indian Studies at the University of Toronto. He also underwent psychoanalytic training for eight years beginning in 1970, and he became a qualified psychoanalyst in 1978. Two years later, in 1980, he accepted a position as Projects Director of the Sigmund Freud Archives. (Joint Appendix 62-63).

While doing research in the Archives, Masson discovered material regarding Freud's "seduction theory," an early, controversial hypothesis that childhood sexual abuse caused certain emotional disorders. Freud had eventually abandoned the theory, contending that his patients merely imagined such abuse. The new material, long suppressed by Freud's daughter, Dr. Anna Freud, and other prominent psychoanalysts, led Masson to believe that Freud had discarded the theory for personal

rather than scientific reasons, despite his knowledge that children really were being molested. (J.A. 63).

Masson discussed this material with a reporter from the *New York Times*, which published two articles about Masson's discoveries. Dr. Anna Freud, Dr. K.R. Eissler, and other senior members of the Archives denounced Masson's findings and fired him in 1981. The *Times* also reported the firing. Respondent Malcolm, a staff writer on the *New Yorker* magazine, read about Masson in the newspaper and, in October, 1982, called Masson and asked to interview him about the controversy. (J.A. 47, 63).

3. Malcolm's Interviews With Masson

Masson gladly agreed to be interviewed, and in November, 1982 Malcolm went to meet him in Berkeley, California. At the first meeting she asked if she could tape-record the interviews, explaining that this would be to Masson's advantage because there would be no misquotations. Once again Masson agreed, and Malcolm ultimately compiled over 40 hours of tape-recorded interviews. On several occasions, Masson told her he was concerned that she quote him accurately; Malcolm assured him that she had it all on tape, and Masson should not worry because all quotes would be verbatim. She further promised that all facts would be checked by the famed fact-checking department of the *New Yorker*, though there would be no need to check quotes because there was a perfect record of them. (J.A. 63, 66). The taped interviews, which were the basis for most of the article that followed, have now been transcribed and are a part of the Clerk's Record; they covered a wide range of topics, including Masson's professional views and personal life. (C.R. 65).

4. Masson's May, 1983 Visit To New York

Six months after these interviews, Masson came to New York to work with the publisher of his forthcoming book, *The Assault On Truth: Freud's Suppression Of The Seduction Theory*. He accepted Malcolm's invitation to stay at her home during this trip. Although there had been interim, tape-recorded interviews on the telephone, by this time Malcolm had nearly finished writing her article about Masson; she told him she did not wish to talk about it and did not want Masson to see what she had written. Malcolm did organize, and tape-record, a party for Masson with other psychoanalysts. She also spoke with Masson about his edition (for Harvard University Press) of Freud's letters to the physician Wilhelm Fliess, and about Masson's reaction to a book written by the head of the Freud Archives, Eissler. The visit, however, was primarily social – Malcolm took no notes, and asked Masson no questions about the material for her article. (J.A. 64-66). She did not mention the visit in the article, and made no use of the tape recordings from the psychoanalysts' party. (J.A. 64).[1]

---

[1] Malcolm now contends that Masson made at least three of the disputed quotes during this visit, but that her tape recorder was broken, so she took handwritten notes which she later destroyed. She contends further, however, that four pages of typewritten material were taken from those notes. (J.A. 52-53, 112-118). Masson denies that he ever held such a conversation with Malcolm, or that Malcolm ever said anything about a tape recorder being broken. (J.A. 65-66). Significantly, in the article, the quotes allegedly made in New York are portrayed as part of conversations set in Berkeley, or as part of a November telephone conversation. (J.A. 68-69, 71, 79, 94, 126, 135).

5. Misquotations Discovered During Fact-Checking

Malcolm took Masson to meet other staff members at the *New Yorker*, including in particular the fact-checking department. She told him that he would be spending a lot of time with these people going over the article. But when fact-checker Nancy Franklin contacted Masson to verify information pertaining to the interviews, he became alarmed at the large number of errors. For example, Franklin asked whether Masson had been responsible for his ex-wife Terri's interest in analysis, and whether it was correct to call Terri "Polish." Masson had told Malcolm that Terri was in analysis when he met her and that she was not "Polish," but a Polish Jew who had been in the Warsaw ghetto, suffered from Polish anti-Semitism, and would object to being incorrectly called "Polish." Franklin asked if Masson's father came from Bessarabia; he said he had never heard of Bessarabia. Masson now told Franklin that he was concerned about the accuracy of the quotations being ascribed to him, and asked her to read back all of his purported quotations since there were so many errors in the few passages they had discussed. (J.A. 66-67).

Franklin refused, but told Masson not to worry because there were tape-recordings of all the conversations and the quotes would be verbatim. She then asked if it was true that Eissler returned Masson's letters unopened; Masson told her that was false and asked how all of these falsehoods could appear in Malcolm's writing if everything was on tape. Masson insisted that all quotations be verified with him because he was certain there were many inaccuracies, and asked Franklin to convey his concerns to Malcolm and then contact him again.

Franklin said she would do so, but Masson heard nothing more from respondents. (J.A. 67).

6. Misquotations In The Article

Franklin corrected these errors on the galleys but the article ultimately published by respondent *New Yorker* in December 1983 contained the original misquotations (J.A. 67-68, 226-28; C.R. 100, Ex. 2-5), along with many others, as Masson had feared. Although Malcolm reportedly told the respected editor-in-chief of the *New Yorker*, William Shawn, that "[e]verything that was quoted was on tape," (J.A. 223), the article actually attributed to Masson many fabricated quotations that do not appear anywhere on the tapes. The following quotes are the focus of this suit.

In the article, for example, Malcolm stated that during their first interview in a Berkeley restaurant, Masson compared his affair with an older graduate student to his relationship with the senior members of the Archives in the following words:

> She [the graduate student] said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room – you're just a social embarrassment anywhere else, though you do fine in your own room." *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo – you get your pleasure from him, but you don't take him out in public."*
> (emphasis added)
> (J.A. 94).

The quote about the graduate student was accurate (J.A. 94-95), but Masson never called himself an "intellectual gigolo," and the emphasized portion of the above

quotation is an alteration of completely separate conversations. (J.A. 96, 104). The tapes do contain the following statement, which was not in the article:

> I couldn't get patients. . . . And I turned to these people who were supposed to be my friends and helpers and none of them offered anything. [Eissler and Anna Freud] felt, in a sense, I was a private asset but a public liability. . . . They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.
> (J.A. 104).

Malcolm contends that Masson did call himself an "intellectual gigolo," though she claims it was during his May, 1983 visit to New York while her tape recorder was broken, and points to the typewritten document taken from her destroyed notes. (J.A. 115). Masson denies that he made the statement, and contends the document was fabricated. Alternatively, Malcolm relies on other taped statements made by Masson that she contends are similar, though none make any reference to "intellectual gigolo" or to any such concept. In these other statements, Masson discussed his belief that others within the psychoanalytic community ascribed his success to a "psychopathic quality," the charm of "the imposter," but said he disagreed with this "cheap," superficial analysis. (J.A. 97-98, 101). The tapes also contain a passage in which Masson paraphrased Malcolm's comment that younger analysts "go around worshipping the older analysts," using the phrase "suck stories" to characterize their attempts to ingratiate themselves. (J.A. 104-105). Malcolm denies that she told Masson that all quotes were taken from the tapes, and contradicts *New Yorker* editor-in-chief Shawn's testimony

that she made similar assurances to him. (J.A. 48-49, 83; *cf.* J.A. 223-24).

In the article, Malcolm also purported to quote Masson's discussions in Berkeley of his plans for Freud's house, Maresfield Gardens, which he was to occupy after the death of Anna Freud. On the tape, Masson had said:

> But it's dark and somber and nothing went on in there. Boy, I was going to renovate it and open it up, and the sun would come in and there would be people and – Well, that's what it needs, but it is an incredible storehouse. I mean the library, . . . "
> (J.A. 127)

Malcolm's typed manuscript of the article reads:

> I would have renovated it, opened it up, brought it to life. Sun would have come pouring in, people would have come, there would have been parties and laughter and fun.
> (J.A. 133)

The last sentence was crossed out, and the following sentence, which appeared in the article, was handwritten above it:

> Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun.
> (J.A. 133-134).

This sentence is not on any of the tape recordings, and Masson never made the remark. (J.A. 79). The galley of this particular passage has a handwritten notation reading: "? on tape." (J.A. 134).

Malcolm contends that Masson made the statement during the May 1983 trip to New York while her tape recorder was broken, and points again to the typewritten document derived from her destroyed notes. (J.A. 115, 127). Masson denies making the statement or even discussing the issue during that trip. As an alternative, Malcolm again cites other tape-recorded statements by

Masson about his personal life. Masson had explained to Malcolm that he became interested in analysis because he considered his youthful promiscuity to be a symptom of a neurosis. He estimated he had slept with close to a thousand women, and saw this as an illness. (J.A. 129-132). Masson also said that he would have "great parties" in Maresfield Gardens and stated that he and another analyst would introduce women to each other. (J.A. 128-129).

The article contained another speech, never made by Masson and entirely absent from the tapes (J.A. 68-70), in which he allegedly boasted about the reaction to a book he was writing about his findings:

> "Wait till it reaches the best-seller list, and watch how the analysts will crawl," he crowed. "They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived."
> (J.A. 135).

Once again, Malcolm contends Masson made this statement during the 1983 visit to her home in New York, and it appears in the typewritten document she allegedly prepared from her notes. (J.A. 112-113, 135). On the tapes, Masson did talk about the importance of his discoveries, but stressed the psychoanalytic community's universal condemnation of the conclusions he drew from these discoveries:

> I assure you when [my] book comes out, which I honestly believe is an honest book, . . . the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it.
> (J.A. 136).
> Talk to Kernberg. Boy, he won't like my position one little bit, you can be sure. He hates it with a passion. . . . Talk to enough analysts and get

them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[t] Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it's me. It's me alone. . . . (J.A. 139) [discussing childhood rape].

Masson: Yeah but I've become, for better or worse; analysis stands or falls with me now.

Malcolm: Well that's a very grandiose thing to say.

Masson: Yeah, but it's got nothing to do with me. It's got to do with the things I discovered. (J.A. 137).

Uh, and when these, this book comes out, it's, uh, I mean I really feel it spells the beginning of the end of psychoanalysis, and he's definitely going to blame me, as will every other analyst in the world for having done psychoanalysis an irreparable damage. But what they'll say beyond that is still a puzzle to me, how they're going to reinterpret the documents I've found so that it, on the contrary, uh, enhances Freud's image is totally mysterious to me.
(J.A. 145).

Malcolm's article also related a statement by Masson about a generally respectful paper he had read to a professional society in New Haven which had concluded with a discussion of the sterility of psychoanalysis. For Masson, the consequences had been dire, for Eissler had given this paper as one reason for Masson's termination from the Archives. (J.A. 75). The scene was again set in Berkeley, this time in Malcolm's hotel room:

> When Masson hung up the telephone I . . . asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outré views into the bitter and belligerant anti-Freudian he had become.
>
> Masson sidestepped my question. "You're right, there was nothing disrespectful of analysis in that paper," he said. "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in."
> (J.A. 175).

Masson did say that the last sentence of the paper was possibly a "gratuitously offensive way to end a paper to a group of analysts," (J.A. 176), but in response to her question, "What were the circumstances under which you put it [in]," (J.A. 176), he told Malcolm in detail why he felt compelled to put it in:

> Masson: That it was, was true. . . . As simple as that. I really believe it. I didn't believe anyone would agree with me. . . . But I felt I should say something because the paper's still well within the analytic tradition in a sense. . . . It's really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile and I believe that one, . . .
>
> I said, "[Freud] began a trend away from the real world that has come to a dead halt," and that's what I believe.
> (J.A. 176-177).

Masson's purported statement is not in the tapes, and Malcolm does not claim to have any documentation of it from the New York visit in 1983 or from any other conversations. (J.A. 179-180). Malcolm further admits Masson

never "sidestepped" her question because she never asked it:

> Let me put it this way. I never said, "Jeff, what has brought on your sudden virulent anti-Freudianism," as far as I can remember. Maybe you can find it in the testimony and I am mistaken. I am talking about my state of mind here and not Mr. Masson's.
> (J.A. 180-181).

In the article, Masson is quoted at the Berkeley restaurant describing his grandfather as:

> a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff – it sounded better.
> (J.A. 87).

This passage first appeared as a handwritten addition to the galleys (J.A. 90-91); it does not appear on the tapes, nor was it in Malcolm's notes of the tapes or in her manuscript. During a telephone conversation a month after the Berkeley interviews, Malcolm asked Masson for clarification of his name change, and he explained that the change was made as part of his analysis and a return to his family tradition:

> Masson: I changed my middle name, I didn't like it. [M]y dad's family name used to be Moussaieff, . . . [H]is father changed it. . . . Just to hide his Jewishness, I'm sure – . . . I first took it as my last name, and [my wife] objected that nobody could pronounce it and nobody knew how to speil it, and it wasn't the name that she knew me by, and so I said, "Okay."
>
> Malcolm: But you wanted to change it, to just remove Masson, didn't you?
>
> Masson: Yeah. I wanted to get back Moussaieff. . . .

> Malcolm: Um-hmm. Was that to épater the Toronto Institute or –?
>
> Masson: No, I just liked it. I just don't – . . . You know, it was sort of part of analysis, return to the roots, and your family tradition and so on.
> (J.A. 87-89).

Finally,[2] Masson in the article related to Malcolm a conversation in which Dr. Eissler pressured him to keep quiet about his discoveries so as not to "poison Anna Freud's last days."

> "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence."
>
> "Why should I do that?" [Eissler responded] "Because it is the honorable thing to do." Well, he had the wrong man.
> (J.A. 215).

These remarks do appear on the tapes and in Malcolm's handwritten notes taken from the tapes, but the actual remarks have been edited. Masson actually related the last portion of the exchange as follows (the deleted portions are emphasized):

> "You know, why should one do that?" "Because it's the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?"* Well, he had the wrong man.
> (J.A. 215).

---

[2] There are additional false quotations in the article, many of which are nondefamatory, such as the errors Masson discussed with the fact-checker, Franklin. Since the thrust of the defamation is apparent from quotations identified above, other allegedly defamatory quotes will not be discussed in detail here, though the Ninth Circuit did address them. (Pet. App. A at A-16-28).

7. Publication of Book; Reactions

Five months after respondent *New Yorker* published Malcolm's article in December 1983, respondent Knopf republished essentially the same material in book form as *In the Freud Archives* (all quotes in the Joint Appendix are from the book). By that time Robert Gottlieb, the president of Knopf, was aware that an attorney for Masson had contacted the *New Yorker* about the piece, and that a complaint had been lodged against Malcolm. (J.A. 224-226). Despite awareness of these complaints, Knopf published the piece without altering in any way the quotations that defamed Masson.

After publication of the book, Masson wrote a letter to the *New York Times* Book Review criticizing Malcolm's portrayal of him. In response, Malcolm composed a letter to the *Times* in which she asserted:

> I . . . allowed [Masson] to speak for himself, in direct quotation. . . . The portrait, in fact, is based on more than 40 hours of tape-recorded conversations with Mr. Masson, which began in Berkeley, . . . Many of things [sic] Mr. Masson told me (on tape) were discreditable to him, and I felt it best not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The "almost" refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversations with Mr. Masson to the editors of the Book Review whenever they have 40 or 50 short hours to spare.
> (J.A. 222-223).

Reviewers of the book and article believed Malcolm and condemned Masson. In the *Boston Globe*, psychiatrist and Harvard professor Robert Coles wrote:

> Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist – mean-spirited, self-serving, full of braggadocio,

> impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such; his own words reveal this psychological profile – a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession.
> Coles, "Freudianism and Its Malcontents," *Boston Globe*, May 27, 1984 at 58, 60 (C.R. 69) (Pet. App. A at A-36) (Kozinski, J., dissenting).

Reviews of Masson's own book referred back to Malcolm's portrayal:

> . . . Malcolm's portrait of Masson is devastating: largely through his own words he emerges as a feverish jumble of vanity, self-destruction, childishness, and ruthlessness.
> Kirkus Reviews, April 1, 1984 at 395 (C.R. 69) (Pet. App. A at A-36-37) (Kozinski, J., dissenting).

Reviewers even chastised Masson for adopting his traditional family name as his middle name, stating that "the middle name is sort of a fake." *Huntsville Times*, January 7, 1984. (J.A. 93).

8. Proceedings In The District Court

Contending that the misquotations described above and many others of similar import were defamatory or placed him in a false light, Masson, a California resident, filed this diversity action pursuant to 28 U.S.C. §1332 against New York residents Malcolm, The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc. On August 19, 1986, Judge Eugene F. Lynch of the United States District Court for the Northern District of California granted partial summary judgment for respondents on the grounds of substantial truth, and urged respondents to pursue other defenses by motion for summary judgment. (Pet. App. C at C-2 n.3 and C-15). On August 17, 1987, the

Court granted summary judgment in favor of all respondents, concluding that "[n]o clear and convincing evidence exists that would justify a finding that [respondents] entertained serious doubts about the truth of the disputed passages." (Pet. App. B at B-28).

9. Opinion Of The Ninth Circuit

The Ninth Circuit Court of Appeals affirmed the summary judgment against petitioner on August 4, 1989. Judge Arthur L. Alarcon wrote the majority opinion, in which he was joined by Judge Cynthia Holcomb Hall. Judge Alex Kozinski filed a lengthy dissenting opinion.

Although the Court, for purposes of reviewing the summary judgment, "assume[d] the quotations were deliberately altered," (Pet. App. A at A-5), it determined that Masson did not establish with convincing clarity that respondents, in fabricating the quotes, acted with knowing or reckless falsity. (Pet. App. A at A-30). The Court held that an author may "fictionalize quotations 'to some extent,' " determining that there could be no inference of actual malice:

> provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by the public figure, . . . or do not "alter the substantive content" of unambiguous remarks actually made by the public figure, . . . (Pet. App. A at A-10-11).

The Court discussed each of the allegedly defamatory statements and held that Masson would not be able to prove clearly and convincingly that any were made with actual malice. For example, Masson's statement that Eissler "had the wrong man" was ambiguous, the Court found, in that it was unclear whether Masson was "the 'wrong man' to keep silent for selfish purposes or the 'wrong man' to do something honorable." Malcolm's

decision to edit the quote so that Masson clearly refused to act honorably was therefore a "rational interpretation" of Masson's ambiguous remarks. (Pet. App. A at A-29)

Regarding Masson's fabricated prediction that analysts would call him "the greatest analyst who ever lived," the Court found that it "reflects the substance of Masson's self-appraisal" in light of other "egotistical and boastful" statements that Masson actually made. A jury therefore could not conclude that Malcolm entertained serious doubts about the passage's accuracy. (Pet. App. A at A-18)

In discussing the statement about Mansfield Gardens, the Court did not explicitly apply either prong of its holding, but broadly found that "the 'sex, women, fun' quote is consistent with Masson's description of his life style and conception of 'fun.' " (Pet. App. at A-18).

The Court determined that the phrase "intellectual gigolo" was a rational interpretation of Masson's actual comments, and did not alter the substantive content of Masson's description of himself as a private asset but a public liability. (Pet. App. A at A-14). The Court noted that Masson's only proof that he did not make the statement was "his simple, albeit vehement, denial. This showing is simply insufficient to pass muster under the clear and convincing standard of proof." (Pet. App. A at A-14 n.4). The Court similarly dismissed Masson's claims of actual malice regarding the remaining altered quotations.

The Ninth Circuit therefore affirmed summary judgment for Malcolm and her publishers even though:

> It is uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson.
>
> (Pet. App. A at A-31)

The Court further determined that the phrase "intellectual gigolo" was not defamatory because, *inter alia*, the "incremental harm" to reputation caused by the phrase, beyond the harm caused by the nonactionable remarks in the article, was nominal or nonexistent. Given the "general tenor of the article and the many provocative, bombastic statements indisputably made by Masson . . . ," (Pet. App. A at A-16), the defamation claim was not actionable.

SUMMARY OF ARGUMENT

A. Deliberately altered and fabricated quotations do not represent the honest, inevitable, commonplace inaccuracies that this Court sought to protect in *New York Times Co. v. Sullivan*, 364 U.S. 254, 271, 278 (1984). Journalists almost universally condemn the practice, and by placing the statements between quotation marks, Malcolm knew she was falsely telling her readers that Masson had actually made the statements.

Masson is not asking this Court to impose liability for paraphrases, misperceptions, minor changes to correct for grammar or syntax, nondefamatory statements, or publications which alert readers that conversations have been fictionalized. Fabricated quotations that purport to be verbatim, however, deserve no more immunity than would any other calculated falsehoods, because they are at odds with the premises of democratic government that the First Amendment protects. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

This Court has recognized that even careless errors interfere with the quest for truth protected by the First Amendment. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

Since respondents do not contend that the "right to doctor quotations is important to the operation of a free and robust press," (Pet. App. A at A-57 (Kozinski, J., dissenting), the Court has a duty to discourage the publication of false quotes. *Herbert v. Lando*, 441 U.S. 153, 172-73 (1979). Fabricated quotations damage the individual public figure's right to speak his or her own mind, and the Ninth Circuit's rule gives writers a privilege to invent any quotation that might arguably be consistent with the public figure's character.

The First Amendment protects communications, yet the Ninth Circuit's rule protects only a writer's privilege to distort while interfering with the speaker's right to expression and the audience's right to accurate information. To protect First Amendment values, the Court must reverse the decision of the Ninth Circuit.

B. Following the guidance provided by this Court for determining whether there was knowing or reckless falsity, the Ninth Circuit should have found that fabricated quotes could amount to deliberate falsification because they were fabricated and the product of Malcolm's imagination. *St. Amant v. Thompson*, 390 U.S. 727, 731-2 (1968). Instead, the Ninth Circuit protected writers whose fabricated quotes were found to be rational interpretations of ambiguous remarks. (Pet. App. A at A-10). In doing so, the Court misapplied cases in which this Court has protected writers for mistakes in choosing words to describe or paraphrase ambiguous documents or events. *Time, Inc. v. Pape*, 401 U.S. 279 (1971), *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). Nothing in either case implies that writers who purport to give full, direct quotations of a speaker are free to invent new quotations, either to resolve any ambiguity the writer might perceive in the speaker's words or to

illustrate the writer's perception of the speaker's character.

The Ninth Circuit also protected fabricated quotes that it found did not alter the substantive content of actual unambiguous remarks. This standard was derived solely from *dicta* in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied sub nom, Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977) which involved translation of a third party's words and the publisher's attempt to reduce the defamatory impact of those words. Neither *Hotchner* nor any other case has granted writers and publishers the dangerous privilege bestowed by the Ninth Circuit upon them.

In this case, each fabrication by Malcolm increased the defamatory impact and, in many instances, stated the opposite of what Malcolm knew Masson believed. The Court's sanctioning of a quote that "reflects the substance of Masson's self-appraisal." (Pet. App. A at A-18), would allow writers to invent almost any quote about public officials, political candidates, or other public figures.

C. Under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the Ninth Circuit was required to resolve all credibility determinations and draw all justifiable inferences in favor of Masson in deciding whether to grant summary judgment. Instead, the Court found Masson's statement that he did not make one of the disputed statements to be insufficient, gave the benefit of every doubt to respondents, and ignored substantial evidence of knowing or reckless falsity. In contrast to the Ninth Circuit, other Circuit Courts have properly applied *Anderson* in reviewing evidence of actual malice.

In fabricating quotes a writer "necessarily entertained serious doubts as to the truth of the statements."

Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976). The record demonstrates Malcolm's knowing fabrication of the "sex, women, fun" passage as she progressively altered it to be defamatory. (J.A. 133-134). Malcolm told Masson, her editor-in-chief, and the readers of the *New York Times* that all quotes were on tape, yet now admits many were never taped. She claims three of the most damaging statements were made during an untaped conversation during a social visit months after the initial interviews and after most of the article had been written. She claims to have taken notes, which she destroyed, but relies on a typewritten document purportedly derived from the notes. On summary judgment the notes must be disregarded as evidence that Masson made the statements, and a jury could reasonably believe they were forgeries, calculated to conceal her knowledge that the quotes were false.

A jury could also determine that the publishers displayed reckless disregard for the truth by failing to take the time to review the tapes despite their awareness of many claimed errors in the article. *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2697-99 (1989) held that such "purposeful avoidance of the truth" would constitute actual malice.

D. The Ninth Circuit also erred in determining that the "intellectual gigolo" passage was not actionable under the so-called "incremental harm branch" of the "libel-proof doctrine." The District of Columbia Circuit in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986) emphatically rejected the theory as inconsistent with federal law, and it is also inconsistent with this Court's

recent acknowledgement that defamers may be more successful if part of their publications are true. *Connaughton*, 109 S.Ct. at 2698 n.37.

The Ninth Circuit's determination that Masson's "provocative, bombastic" statements precluded him from recovering for the "intellectual gigolo" passage is contrary to the First Amendment's goal to promote "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The quest for truth in this society demands that public figures make provocative, even bombastic statements, and to protect the First Amendment the Court must not protect fabricated quotations.

ARGUMENT

A. THE FIRST AMENDMENT REQUIRES THIS COURT TO DISCOURAGE, NOT PROMOTE, THE DELIBERATE ALTERATION AND FABRICATION OF QUOTATIONS

By extending constitutional protection to deliberately altered and manufactured quotations, the Ninth Circuit has encouraged the publication of these dangerous falsehoods even though they do not "represent[ ] the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984). The constitution requires a "defense for erroneous statements honestly made" because "erroneous statement is inevitable in free debate." *New York Times Co. v. Sullivan*, 364 U.S. 254, 271, 278 (1964). As Justice Powell explained:

> The First Amendment requires that we protect some falsehood in order to protect speech that matters.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)

Fake quotes do not constitute either "speech that matters" or the type of honest, inevitable, commonplace falsehoods entitled to protection despite their lack of constitutional value. Unlike the stereo reviewer prone to malapropisms in *Bose Corp.*, Malcolm cannot contend that she "did not realize [her] folly at the time," *Bose Corp.*, 466 U.S. at 513, and deliberate alterations are not inevitable. Fabricated quotations, far from being commonplace, are anathema to responsible journalists, and the press has emphatically rejected the privilege handed to it by the Ninth Circuit.[3]

Under California defamation law, attributing false quotations to a person may constitute libel. *Selleck v. Globe International, Inc.*, 166 Cal.App.3d 1123, 1132, 212 Cal.Rptr. 838, 844 (1985); *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 72-73, 155 Cal.Rptr. 29, 35-36, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds, McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-26 n.9 (1986). See also *When*

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[3] In his dissent below, Judge Kozinski set forth at some length the nearly unanimous condemnation of such practices by journalists. (Pet. App. at A-55-69 (Kozinski, J., dissenting)). Even if "concoct[ing] the perfect quote to make the point" is constitutionally protected, *Time* magazine calls the practice "morally indefensible," and quotes Bill Monroe, editor of the *Washington Journalism Review* as follows: " 'I don't know how any journalist can be happy with a judge condoning tampering with specific quotes.' " Henry, "The Right To Fake Quotes: A journalist's legal victory raises questions about ethics," Time, August 21, 1989, at 49. See also Warren, "To tell the honest truth, has the court given journalists a right to lie?" reprinted in Society of Professional Journalists, *Solutions Today For Ethics Problems Tomorrow: A Special Report by the Ethics Committee of the Society of Professional Journalists, 1989* (October 10, 1989).

Is A Quote Not A Quote? The Subjectivity of Truth In Masson v. New Yorker Magazine Inc., 64 ST. JOHN'S L.REV. 150, 162-64 (1989). Other states have also recognized that defamatory, false quotations are actionable; as the New York Court of Appeal reasoned in *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 255, 167 N.E. 432, 433-34 (1929):

> In order to constitute a libel, it is not necessary for the defendant . . . to directly attack the plaintiff as an ignorant imposter. The same result is accomplished by putting in her mouth or attaching to her pen words which make self-revelation of such a fact.

Although even extreme departures from journalistic standards do not, standing alone, deprive a journalist of First Amendment protection, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2685 (1989), such standards will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is "of a character" protected by the First Amendment. *Id.* at 2696, 2698-99.

Generally, for example, a journalist who finds a person's words to be unusable as a quote should resort to paraphrase, not invention, thereby informing the reader that the journalist to some extent has interpreted the person's actual words. (Pet. App. A at A-35-38 and A-68 (Kozinski, J., dissenting)); See also *Masson v. New Yorker Magazine, Inc.: But Don't Quote Me On That*, 21 PAC.L.J. 1107, 1132-1136 (1990)(discussing Ninth Circuit's blurring of distinction between quotes and non-quoted paraphrases). If Malcolm states, "Masson thinks he is the greatest analyst who ever lived," the reader recognizes this as Malcolm's possibly biased conclusion. The damage to Masson's reputation is reduced and, even if the statement is false, it might be difficult to prove Malcolm knew

it was false. There is no way to derive any information about Malcolm's bias from her false quotation of Masson "crowing" that analysts will say "he's the greatest analyst who ever lived." (J.A. 135).

There is no doubt Malcolm was aware that readers would erroneously believe Masson had made the quote.

> "[W]hen a newspaper puts quotation marks around a sentence, they warrant that is what the speaker literally spoke. If you make up quotes or alter them in any way you are misleading readers."
>
> "We think quotation marks are sacred. They represent our bond to the reader that the words inside the quotation marks were actually spoken in the way reported."
>
> Stein, "9th Circuit: It's OK to make up quotes," *Editor & Publisher*, August 12, 1989. (quoting James I. Houck, managing editor of *Baltimore Sun*, and Max Frankel, executive editor of *New York Times*).[4]

In her letter to the *New York Times*, Malcolm acknowledged the significance of quotation marks and stated, falsely, that she "allowed [Masson] to speak for himself, in direct quotation. . . . Everything I do quote Mr. Masson as saying was said by him, almost word for word." (J.A. 222).

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[4] See also Pet. App. A at A-32-37. (Kozinski, J., dissenting). Judge Kozinski noted that the *New Yorker* in particular has cultivated a reputation for accurate quotations and, in a non-litigation context, former editor-in-chief Shawn has stated, "We do not create conversations." (Pet. App. at A-66, A-86-87 (Kozinski, J., dissenting)). As former Secretary of State Henry Kissinger reportedly stated, in answering a question as to whether he had made a particular statement reported in the *New York Post*: " 'If it was quoted, I must have said it.' " Grutman, *Lawyers and Thieves* at 104 (1990).

At some point, a paraphrase would be actionable, but Masson here is not complaining of paraphrases, or of conversations included in docudramas, memoirs, reviews or other publications where the reader is told the quotes are not verbatim. (See Pet. App. A at A-70-73 (Kozinski, J., dissenting)).

Nor is he complaining of minor "changes made for the sake of correct syntax," which are commonplace and are the only alterations Malcolm admitted in her letter to the *Times*. (Pet. App. A at A-58-61, A-74-75 (Kozinski, J., dissenting); J.A. 222). This was also not a question of misperception or faulty notes. Since Malcolm attended the interviews and had possession of the tapes, she necessarily knew that the quotes she was attributing to Masson were false; i.e., she knew that Masson did not say, "I was like an intellectual gigolo." *Connaughton*, 109 S.Ct. at 2697-98.

Respondents also knew that many of the nondefamatory passages in the article were false, including the passages Masson discussed with the *New Yorker* fact-checker. (J.A. 66-68, 226-228). Masson obviously cannot object to these passages in this suit, except insofar as they place him in a false light or support the defamatory nature of the passages at issue. (Pet. App. A at A-75-79 (Kozinski, J., dissenting)).

Masson, therefore, does not seek to impose liability on any writer who departs from full, direct quotations, as respondents have argued. He complains of deliberately altered and manufactured quotations that defame him.

Malcolm presumably used false quotations to make her work more entertaining. (See Pet. App. A at A-37 n.2 (Kozinski, J., dissenting). The quotes conveyed no additional information, and by deliberately placing quotation

marks around words she knew Masson had not used, Malcolm was engaging in a calculated falsehood that threatens the constitutional interest in freedom of speech:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . , should enjoy a like immunity. . . .
>
> For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.
>
> *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)

As shown in *Garrison* and *New York Times*, 376 U.S. at 279 n.19, the Court initially perceived some merit in the innocent falsehoods protected by its new standard, but more recently it has determined that they have "no constitutional value." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues." *Id.*, (quoting *New York Times*, 376 U.S. at 270). In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Court stated even more emphatically:

> False statements of fact are particularly valueless; they interfere with the truth – seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.
>
> *Hustler Magazine*, 485 U.S. at 52.

A Court should consider the benefits and the dangers presented by a particular type of falsehood at issue in

deciding whether to extend constitutional protection. The Ninth Circuit erred in affirming summary judgment against Masson without ever addressing the question posed by the dissent: "is the right to doctor quotations important to the operation of a free and robust press?" (Pet. App. A at A-57 (Kozinski, J., dissenting)). Malcolm and her publishers have never shown that right to be important. There was no justification, therefore, for the court's attempt to co-opt the "rational interpretation" doctrine for a totally unintended use.

The Court below also erred in not considering the potential dangers of its ruling. Courts have a duty to discourage the publication of calculated falsehoods such as deliberately fabricated quotes, and should impose liability on those who publish with the requisite culpability:

> not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. . . . [L]iability for damages which in turn discourages the publication of erroneous material known to be false or probably false . . . does not abridge either freedom of speech or of the press.
>
> *Herbert v. Lando*, 441 U.S. 153, 172 (1979)

False quotes interfere with the "freedom to speak one's mind [which] is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp.*, 466 U.S. at 503-04. In attributing fabricated quotes to Masson, Malcolm and her publishers deny Masson the freedom to speak his mind both at the time of publication – by replacing his words with their own – and in the future, by making him an object of derision and ridicule. (J.A. 79-81). Defamation is a favorite tactic of those who seek to suppress the controversial opinions of others, and

the threat to First Amendment values is greater where the defamers purport, not to speak their *own* mind, but to speak the mind of the person defamed. Malcolm's fabricated quotes undermine "the power of [Masson's] thought to get itself accepted in the competition of the market. . . . " *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Perhaps the most dangerous aspect of the Ninth Circuit's rationale is its assumption that a Court may review the misquoted person's life history to determine whether, as in the case of the "sex, women, fun" passage, the "quote is consistent with [a public figure's] description of his life style and conception of 'fun.' " (Pet. App. A at A-18). In other words, if the writer and the Court believe Masson is the sort of person who would use the Freud house in that way, he cannot establish knowing or reckless falsity. By giving "authors . . . license to invent quotations on the basis of what they perceive to be a speaker's character," (Pet. App. at A-46 (Kozinski, J., dissenting)), the Ninth Circuit has handed them a right to fake quotes that is virtually without limit.

The Court below did state that actual malice could be inferred "when the language attributed to the plaintiff is wholly the product of the author's imagination," (Pet. App. A at A-10), but it disregarded even this limitation. The language attributed to Masson – "intellectual gigolo," "greatest analyst who ever lived," "sex, women, fun" – was, of course, wholly the product of Malcolm's imagination.

Respondents have burdened the Joint Appendix with voluminous excerpts from the tape-recorded interviews, often repeated, in an attempt to show that the defamatory statements were characteristic of Masson. But Malcolm's

ability as a skilled writer (Pet. App. A at A-49 n.10 (Kozinski, J., dissenting)) to invent quotes that sound like Masson is simply irrelevant in deciding whether, assuming as the Court must that Masson did not make the statements, Malcolm knew that he had not made them. The constitution does not protect writers "unscrupulous enough and skillful enough to use the deliberate or reckless falsehood" effectively. *Garrison*, 379 U.S. at 75.

The Court held that Malcolm could invent the quote, "after Freud, he's the greatest analyst who ever lived," because of the "egotistical and boastful statements" Masson made on the tapes (Pet. App. A at A-18). Writers, therefore, who can point to any statement by a public figure that may be interpreted as egotistical, boastful, cruel, stupid, evil, or bigoted, may now invent a quote exemplifying any of those qualities and attribute it to that public figure. (Pet. App. A at A-38-41 (Kozinski, J., dissenting)).

This type of character assassination seriously interferes with the "common quest for truth." No one reading a news article will know whether the public figures involved in the events of the day actually made the statements attributed to them, or whether the writer of the article invented the statements based on other things said or done by the public figures.[5]

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[5] Although it does not claim to rely on the Ninth Circuit's opinion, White and Sheridan, *In Defense of Poetic License*, LOS ANGELES LAWYER (April 1990) 28, provides a graphic example of this danger by arguing that the First Amendment would protect a journalist who attributed the following invented quote to Police Commissioner Sullivan, plaintiff in the *New York Times* case: "I want you to ring Alabama State College and keep out all of those nigger lovers who are protesting over our arrest of that troublemaker King." *Id.*

> [T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.
> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

Malcolm's "right to fake quotes" was preserved by sacrificing the protection that the First Amendment should afford to the communication, to its source, and to its recipients. This Court has never approved such a wholesale abuse of First Amendment interests.

Ironically, perhaps uniquely, this libel case demands that the Court side with the public figure and against the press in order to protect "[o]ur profound national commitment to the free exchange of ideas." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2695 (1989).

B. "RATIONAL INTERPRETATION" CASES HAVE NO RELEVANCE TO DELIBERATELY FALSIFIED QUOTATIONS, AND NINTH CIRCUIT'S "SUBSTANTIVE CONTENT" STANDARD HAS NO CONSTITUTIONAL SUPPORT

Although acknowledging that the meaning of "actual malice" or "reckless disregard" cannot be captured in "one infallible definition," this Court through its cases has "furnished meaningful guidance for . . . further definition," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), in order to "give content to these otherwise elusive constitutional standards." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2695 (1989).

In deciding to protect publishers of deliberately altered quotes, the Ninth Circuit largely ignored the guidance provided by this Court and instead patched together its own standard from pieces of decisions that do not

support its dangerous result. The Ninth Circuit refused to consider whether respondents' actions would constitute a "calculated falsehood" or "known lie" (*Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)); would reveal the quotes to be "deliberately falsified" (*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967)); would show the quotes were "fabricated" or "the product of . . . imagination" (*St. Amant*, 390 U.S. at 732); or would demonstrate a "purposeful avoidance of the truth." (*Connaughton*, 109 S.Ct. at 2698). As discussed at greater length in section C below, there would be sufficient evidence under these cases to support a jury finding of knowing or reckless falsity by clear and convincing evidence, and the grant of summary judgment was in error. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Ninth Circuit promulgated an "author's privilege to alter quotations" in two circumstances: where the fabricated quotations are " 'rational interpretations' of ambiguous remarks made by the public figure, . . . or do not 'alter the substantive content' of unambiguous remarks actually made by the public figure." (Pet. App. at A-10-11). The first half of the privilege is premised on a complete misreading of the rational interpretation doctrine, and the second on *dicta* from a Second Circuit decision.

The first of this Court's decisions involving "rational interpretations" was *Time, Inc. v. Pape*, 401 U.S. 279 (1971). *Time* magazine's summary of a lengthy report by the United States Commission on Civil Rights omitted the word "alleged" in detailing descriptions of police brutality alleged in a complaint filed against the plaintiff, Pape. *Time* quoted at length from the report's summary of the complaint. *Id.* at 482. The Court found the report to be

"extravagantly ambiguous" as to whether the Commission actually believed the incidents had occurred, and that *Time* had good reason to think the Commission had found the allegations truthful. *Id.* at 287-89.

The Court was concerned about the "set of choices" confronting a publisher who departs "from full direct quotation" of the words of a source regarding an underlying event, and found that an inference of actual malice from the deliberate omission of a word such as "alleged" would only be adequate "when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves." *Id.* at 285. The Court added a "final cautionary note" limiting its holding to the specific facts of this case, and implying that even a similar omission of the term "alleged" in published reports of an unambiguous document might support a finding of knowing or reckless falsity. *Id.* at 292.

Pape protects writers forced to choose particular words when they depart from full direct quotation and paraphrase an ambiguous source. Malcolm was not purporting to paraphrase Masson. Since she had tape recordings there was no ambiguity as to the actual words Masson used, and she faced no choices in quoting Masson verbatim. There was also nothing ambiguous about Masson's statement, for example, that he was a "private asset but a public liability," particularly after he explained that while the older analysts liked to talk openly with him in private, "I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me." (J.A. 104). In the absence of ambiguity, *Pape* has no application.

Malcolm here was purportedly not departing from full direct quotation of Masson, who was not merely a

source of information about a separate event. Masson's words spoke for themselves – they were not just describing an underlying event, they were the event.

Finally, even if Masson's words were ambiguous, *Pape* did not imply that the document's ambiguity entitled *Time* to attribute a fabricated quotation to the Commission or to Pape, either to resolve any ambiguities, or to illustrate *Time*'s perception of their character. (Pet. App. A at A-18). *Pape* dealt with an omission which arguably caused damage, not by changing the nature of the allegation, but only by implying that an authoritative source believed the allegations. *Pape* 401 U.S. at 285. *Time* directly quoted some of the report in its article, but the Court nowhere implied that *Time* was free to alter those quotes or silently fabricate new ones.

The Ninth Circuit cited *Pape* not only for its privilege to alter quotes but also to justify respondents' editing of Masson's remarks, particularly the passage in which Masson said Eissler "had the wrong man." (J.A. 215). Once again, Malcolm was not paraphrasing Masson, and there were no ambiguities as to the words Masson actually used. Masson said:

> "[W]hy should one [keep silent]? "Because it's the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?"* Well, he had the wrong man.
> (J.A. 215).

By removing the emphasized passages, Malcolm effectively reversed Masson's remarks, so that instead of saying he was the wrong man to be bribed into silence, he stated he was the wrong man to do "the honorable thing." *Pape* allowed the omission of one word where the

document was "extravagently ambiguous" as to its meaning; it did not sanction a wholesale reworking of someone's actual remarks so as to state the opposite of what the person said.

The Court's more recent discussion of rational interpretation in *Bose Corp.*, 466 U.S. at 512-14, provides even less support for the type of deliberate alterations encouraged by the Ninth Circuit. The defendant in reviewing brands of loudspeaker systems said that plaintiff's system tended to wander "about the room" rather than "along the wall." This was clearly an event that "bristled with ambiguities and descriptive challenges for the writer," and the description, though erroneous, was "one of a number of possible rational interpretations." *Bose Corp.*, 466 U.S. at 512.

As mentioned above, *Bose Corp.* rejected the District Court's decision favoring the plaintiff because it would make an individual liable for using a malapropism, even though he did not "realize his folly at the time," and the statement was the "sort of inaccuracy that is commonplace" in free debate. *Bose Corp.*, 466 U.S. at 513.

Malcolm was not attempting to describe Masson's facial expressions or tone of voice. In purportedly quoting Masson verbatim, she was telling her readers that she was allowing "Masson to speak for himself in direct quotation," as she again asserted in her letter to the *New York Times*. (J.A. 222). In deliberately altering and manufacturing Masson's statements, she necessarily realized at the time that she was lying to her readers.

In *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987), involving translation of a statement in English into a Spanish headline, the Third Circuit properly applied *Bose Corp.* because it dealt with a translated

headline that purported to convey only the gist of a statement which had no direct translation. Mayor Dunn had complained in English about the city's litter problem, which he blamed in part on recent immigrants.

Defendants' Spanish-language newspaper carried a story on the Mayor's complaint with a headline stating that he had called Hispanics 'cerdos,' a Spanish term which can be translated as "pigs" or "slovenly" or "dirty people." *Dunn*, 833 F.2d at 451 n.2. The editors testified that there was no direct Spanish translation of the term "litterer," and that the use of single quotations marks in Spanish would not signify a literal, verbatim quotation, but only a use of the word in the figurative sense. *Id.* at 451.

The Court found 'cerdos' in its unaltered Spanish version to be a fair, if inadequate translation, less inflammatory than others rejected by defendants, and refused to find actual malice based "solely on the translation to English from Spanish of the language used by the defendant." *Id.* at 452. Since Dunn had presented no "countervailing factual evidence of actual malice," the Third Circuit properly protected the translated headline as a "a rational interpretation of remarks that bristled with ambiguities." *Id.*

Assuming that *Dunn* should apply, here there was substantial "countervailing factual evidence of actual malice," which will be discussed in detail in section C below. But *Dunn* should not apply – the publishers here were representing that Masson made the statements verbatim. They were not paraphrasing his remarks in a headline, and they were not faced with any translation

problems, because the interviews and the article were all in English.[6]

There is even less justification for the alteration of substantive content portion of the Ninth Circuit's privilege. The Court below derived this aspect of its privilege solely from *dicta* in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977), which considered whether the publisher of a book about Ernest Hemingway acted with knowing or reckless falsity in publishing a bowdlerized translation of Hemingway's statement about the plaintiff. The Second Circuit held that publication of a literal translation of the actual quote attributed to Hemingway would have been protected because the quote was "incapable of independent verification, and . . . there are no convincing indicia of unreliability." *Hotchner*, 551 F.2d at 914. Changing Hemingway's statements from calling Hotchner " 'dirty and a terrible ass-licker' to the much milder 'I don't trust him,' " was not done with actual malice:

> "[T]he change did not increase the defamatory impact or alter the substantive content of Hemingway's statement. If Doubleday could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to Hotchner.
>
> *Hotchner*, 551 F.2d at 914.

Nothing in *Hotchner* suggests a writer can alter quotations in order to make them defamatory and then attribute them to a public figure. The case dealt with a dead third party, not with a live plaintiff whose tape-recorded

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[6] *See Ninth Circuit Reveals Shocking Truth! No Protection for Public Figures Against Deliberate Fabrications by Media!: A Comment on Masson v. The New Yorker Magazine, Inc.* 42 RUTGERS L.REV. 1133, 1159-60 (1990).

statements are subject to easy verification and who has notified the publishers of the text's unreliability. Malcolm and her publishers had reason to believe Masson had not made the statements. Far from making the passages less offensive, Malcolm on each occasion made her quotes more sensational and defamatory. "I was a private asset but a public liability" became "I was like an intellectual gigolo"; "the sun would come in and there would be people" became "Sun would have come pouring in, people would have come, there would have been parties and laughter and fun" and then became "a place of sex, women, fun"; "I really must say one thing that I really believe . . . and that was the last sentence" became "I don't know why I put it in."

Malcolm's changes did alter the substantive content of Masson's actual remarks. Malcolm knew Masson "liked" Moussaieff as his middle name because it represented a return to his roots and his family heritage, (J.A. 87-89, 91-92), yet she invented the vain explanation "it sounded better," to make it seem as if Masson made the change out of sheer vanity. An academic like Masson who claims to be an "intellectual gigolo" is admitting that he would prostitute himself intellectually. Masson never made such a statement, and his comment that he was a public liability in that he was "too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me," (J.A. 104) implies that he had not yet attained stature in the psychoanalytic community, not that his principles were for sale.[7]

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[7] Respondents' reference to other taped statements by Masson to show that he boasted of an ability to seduce the

(Continued on following page)

Malcolm actually knew from her conversations with Masson that he had repeatedly refused to compromise his principles in order to advance his career, and it is certainly no coincidence that Malcolm also altered those other statements or fabricated new ones. In the "he had the wrong man" passage, Malcolm deleted Masson's statement that he refused to keep quiet about his termination in the hope that the Archives would let him return, making it appear that he would simply refuse to do an "honorable thing." (J.A. 215).

Malcolm's article falsely states that Masson thoughtlessly "tacked on" his remarks about the sterility of psychoanalysis to his New Haven paper, and that "it was totally gratuitous. I don't know why I put it in." (J.A. 175). But Malcolm had asked Masson why he had concluded the paper in that fashion, and he had told her repeatedly that he said it because "it was, was true. . . . As simple as that. I really believe it. . . . And then I thought, I really must say one thing that I really believe, . . . And that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile . . . . "

(Continued from previous page)

older analysts and visualized his relationship with them in sexual terms, accepted without question by the Ninth Circuit (Pet. App. A at A-13-14 n.4), is irrelevant and factually in error. Malcolm has Masson accuse himself of intellectual, not physical, prostitution. In the other statements, Masson did not boast of an ability to seduce people, but stated that other analysts enviously derided him as a confidence man, a bit of analysis that he rejected as "cheap." (J.A. 97-98). Even if the nature of the fabrication would make sex somehow relevant, Masson's discussion of "suck stories" was referring to the sycophantic behavior of junior analysts, not to any sexual relationship between him and the older analysts. (J.A. 104-105).

(J.A. 176). Malcolm therefore knew Masson had made the statement, which seriously damaged his career, out of strong conviction, yet quoted him saying the opposite.

Malcolm also had Masson say that analysts would say Masson was the "greatest analyst who ever lived," when she knew he had told her that "not an analyst in the country . . . will say a single word in favor of it." Malcolm admitted she knew Masson had made these statements. (J.A. 170, 172).

Masson's actual statements reflect his pride in what he discovered and his resulting isolated position in psychoanalysis, but do not betray a deranged personality crowing that he is the "greatest analyst who ever lived." Masson stated that on "*concrete issues . . . I hold a position* that no other analyst holds, including, alas, Freud . . . It's me alone." (J.A. 139) (emphasis added). When Malcolm questioned his statement that "analysis stands or falls with me now," Masson quickly explained: "it's got nothing to do with me. It's got to do with the things I discovered." (J.A. 137). Masson was definitely proud of his discoveries and their consequences for psychoanalysis, because:

> It's not going to go away, and the reason it's not is because these things are written by Freud, not be me. Freud wrote these letters, I didn't. I just found them and patients are going to say, "What the hell is going on here?"
> (J.A. 146).

Even if these other statements can be characterized as boastful, the Ninth Circuit's conclusion that Malcolm could invent the quote because it "actually reflects the substance of Masson's self-appraisal" (Pet. App. A at A-18), demonstrates that this standard has no coherent limits. Political candidates would be at the mercy of their

opponents and the press if there could be no liability for any manufactured quote that reflected the candidate's self-appraisal, character or actions. The First Amendment demands that this Court impose liability in order to discourage these dangerous, deliberate falsifications.

C. DISPUTED ISSUES OF MATERIAL FACT AND EVIDENCE OF KNOWING FALSITY PRECLUDED SUMMARY JUDGMENT

In reaching its conclusion that the evidence in the record could not " 'support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence . . . ,' " (Pet. App. A at A-4) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the Ninth Circuit purported to apply this Court's decision in *Anderson* to the facts before it. *Anderson*, however, held that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.
>
> *Anderson*, 477 U.S. at 255.

The Court properly disregarded Malcolm's disputed typewritten document and her claim that Masson actually made the statements, noting that for purposes of the appeal "we assume the quotations were deliberately altered." (Pet. App. A at A-5). But in deciding whether Masson actually called himself an "intellectual gigolo," the Court inexplicably resolved an evidentiary dispute against Masson:

> Masson indisputably made numerous statements which were the substantive equivalent of the "intellectual gigolo" quote Malcolm used; Masson's only proof that he never said such a thing is his simple, albeit vehement, denial. This showing is simply insufficient to pass muster under the applicable standard.
> (Pet. App. A at A-13-14 n.4).

This was clearly contrary to *Anderson* and, throughout its decision, the Court gave Malcolm and her publishers the "benefit of every doubt." (Pet. App. A at A-42) (Kozinski, J., dissenting). If the Court had viewed the evidence impartially and drawn all justifiable inferences in his favor, as required by *Anderson*, it would have had no choice but to send the case to the jury.

As discussed at some length above, the First Amendment has never protected calculated falsehoods. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2696 n.34 (1989) (citing *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)). In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), which first applied constitutional standards to public figures, Justice Harlan explained that *New York Times* allowed recovery where "the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity." *Id.* at 153. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) cited *Butts'* discussion of "deliberate falsification," and determined that:

> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.
> *St. Amant*, 390 U.S. at 732.

More recently, the Court in *Connaughton* held that a finding of actual malice could be based on the defendant's "purposeful avoidance of the truth." In that case, although tape recordings of an interview were available to defendants and a key witness was known to them, they neither listened to the tapes nor contacted the witness, making it:

> likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges.
> *Connaughton*, 109 S.Ct. at 2698.

1. Jury Could Infer Actual Malice From Evidence of Deliberate Alterations

Applying these guidelines to the facts of the instant case, a jury could infer knowing falsity solely from the objective evidence that Malcolm attributed words to Masson that he did not say. The article did not purport to convey Malcolm's impressions of Masson, and there is no contention that she misunderstood or misperceived what he said. Malcolm's articles attribute quotes to Masson: "I was like an intellectual gigolo," "Maresfield Gardens . . . would also have been a place of sex, women, fun," "they will say . . . he's the greatest analyst who ever lived," "I don't know why I put it in." She did not say, "Masson thinks he's the greatest analyst who ever lived." Those quotes do not appear on the tape-recordings of the Malcolm-Masson interviews, and Masson denies that he ever made the statements. The Court below accepted that premise in deciding the case.

By placing quotation marks around Masson's words, Malcolm was falsely stating to her readers that he had actually uttered those words, a falsehood she repeated in

her post-publication letter to the *New York Times*. (J.A. 222). Readers reasonably accepted Malcolm at her word. (J.A. 79-81). Since Malcolm conducted the interviews and had the tapes, she knew that Masson never made the statements she was attributing to him, and so published with knowing or reckless falsity.

This is precisely the holding of a California case involving false quotes. In *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds, McCoy v. Hearst Corp.*, 42 Cal.3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-26 n.9 (1986), a novelist was found liable for attributing false quotes to an allegedly fictional psychiatrist who was identified at trial as plaintiff. The novel depicted a therapy session in which the character demanded profanely that a patient "drag" his wife to a "nude marathon." A tape recording of the actual therapy session proved that the plaintiff had actually only made a suggestion in a non-profane manner. The Court determined that the writer's:

> reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the litarary portrayals of that encounter [.] Since she attended sessions, there can be no suggestion that she did not knew the true facts. [Defendant] was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.
>
> *Bindrim*, 92 Cal.App.3d at 72-73; 155 Cal.Rptr. at 35-36.

The Seventh Circuit reached the same conclusion in *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), in which the defendant writer stated that his fabricated quotations of Johnny Carson were "simply a logical

extension of what must have gone on from the facts that I read. . . . " *Carson*, 529 F.2d 212. Writing for a unanimous court, Judge Sprecher held:

> If a writer can sit down in the quiet of his cubicle and create conversations as "a logical extension of what must have gone on" and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. . . .
>
> The defendants in fabricating and imagining "facts" necessarily entertained serious doubts as to the truth of the statements and had a high degree of awareness of their probable falsity. *Carson*, 529 F.2d at 213.

2. Overwhelming Countervailing Evidence Proves Publication With Knowing Or Reckless Falsity

Additional evidence regarding respondents' state of mind uniformly reinforces the inference drawn from the fact that Malcolm deliberately altered the quotes. Since Masson denies making the statements, Malcolm necessarily altered Masson's actual words or fabricated her own; the Ninth Circuit assumed "the quotations were deliberately altered," (Pet. App. A at A-5), and that "Malcolm fictionalized certain quotations and attributed them to Masson." (Pet. App. A at A-31).

The record contains direct evidence of Malcolm's deliberate fabrication of the "sex, women, fun" quote regarding the Freud home. The tapes show that Masson discussed his plans to "renovate it and open it up, and the sun would come in and there would be people. . . . " (J.A. 127). By the time Malcolm had typed her draft of the article, she had altered the quote to read, "Sun would come pouring in, people would have come, there would have been parties and laughter and fun." In handwriting, the quote is further altered to its final, published form:

"Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun." (J.A. 133-134).

Malcolm gradually distorted Masson's words, deliberately falsifying his statements to make them defamatory. Under *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968), a jury could well believe Malcolm acted with knowing or reckless falsity in fabricating these words out of her imagination.

As *Herbert v. Lando*, 441 U.S. 153, 160-165, 164 n.12, 165 n.15 (1979), makes clear, any competent evidence and all relevant circumstances may demonstrate actual malice. Malcolm's claim that Masson actually made some of these statements, buttressed by the typewritten document derived from her notes, would therefore be evidence of actual malice if disbelieved by the jury. On summary judgment, of course, the Court must assume that this claim is untrue and, at most, disregard the notes. But a jury could further believe that Malcolm deliberately destroyed her handwritten notes and forged her typewritten documentation. The jury might well be skeptical that the three most outrageous quotes were all made during one brief, informal, untaped conversation that occurred long after the 40-50 hours of taped interviews and after she had written much of the article. (J.A. 65).

This skepticism would be reinforced by her representation to her editor that "everything was on tape," and her post-publication letter to the *New York Times* which, giving Masson the benefit of the doubt, stated that everything was on tape. Malcolm also promised Masson that all quotes would be taken verbatim from the tapes. Malcolm now claims, of course, that many quotes were not

on tape, but if the jury believes Masson or Shawn it must conclude that Malcolm was lying on at least one occasion.

Both of Malcolm's publishers were guilty of "purposeful avoidance of the truth." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2698 (1989). Masson advised the *New Yorker* of numerous errors and the *New Yorker* falsely promised to contact him again about his concerns before publication. To the extent Malcolm can be considered an employee of the *New Yorker* as a staff writer, her knowledge is imputed to her publisher. Knopf had even greater awareness of disputes over accuracy. (J.A. 224-226). No one at either publisher "took the time" to listen to the tapes, *id.*, which was likely a deliberate decisions to avoid the facts. *Id.*[8]

Under the guidelines established by this Court and other Courts, a jury could well conclude that Masson had produced clear and convincing evidence of knowing or reckless falsity. *St. Amant*, 390 U.S. at 731-2; *Herbert*, 441 U.S. at 164 n.12; *Connaughton*, 109 S.Ct. at 2698-99. In *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1089-93 (3d Cir. 1988), the Third Circuit noted that since the jury could reasonably find either that *Time* did or did not act with knowing or reckless falsity depending on the witnesses it believed and the inferences it drew, there should be no summary judgment. The Court gave plaintiff the benefit of the doubt on all the evidence, including

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[8] Other evidence of actual include: Malcolm's admitted combination of different conversations, including changed locations; the *New Yorker*'s correction in the galleys of the errors Masson explained to Franklin and subsequent publication of the article with the original errors; and Franklin's promise that all quotes would come from the tapes and that she would contact Masson before publication.

Time's deliberate omission of exculpatory language in an F.B.I. memo, evidence from which the jury "could find that *Time*'s alteration implicitly recognized that the story would not 'intrigue' its readers without this significant falsification." *Schiavone*, 847 F.2d at 1092. The Fifth Circuit in *Zerangue v. TSP Newspapers, Inc.*, 819 F.2d 1066, 1071-72 (5th Cir. 1987), similarly conducted an appropriate evidentiary review.

The Court should clarify that this procedure must be followed before lower courts grant summary judgment against public figures, in order to discourage "more erratic and inconsistent" rulings on defamation summary judgment motions. *Anderson*, 477 U.S. at 272-73 (Rehnquist, J., dissenting).[9]

D. THIS COURT MUST REJECT AN "INCREMENTAL HARM DOCTRINE THAT WOULD PRECLUDE PUBLIC FIGURES WHO HAD MADE PROVOCATIVE REMARKS FROM ALL RECOVERY FOR LIBEL

In addition to determining that Malcolm did not fabricate the "intellectual gigolo" passage with knowing or reckless falsity, the Ninth Circuit found that in light of "the many provocative, bombastic statements indisputedly made by Masson and quoted by Malcolm," (Pet. App. A at A-16), the passage was not actionable under

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[9] To the extent the decision below turned on falsity rather than actual malice, the *Anderson* standards should not even have been imposed. See the careful analysis of this issue in *Masson v. New Yorker Magazine: Actual Malice and Direct Quotations – The Constitutional Right To Lie*, 65 NOTRE DAME L. REV. 564, 567-69, 574-80 (1990). The Court left this question open in *Connaughton*, 109 S.Ct. at 2682, noting a conflict among the circuits.

the " 'incremental harm branch' of the 'libel-proof' doctrine." (Pet. App. A at A-15). The Court cited in support only *Herbert v. Lando*, 781 F.2d 308, 310-11 (3d Cir.), *cert denied*, 476 U.S. 1182 (1986), though it acknowledged that "the *Herbert* court denied that it was applying the . . . 'incremental harm' doctrine." (Pet. App. A at A-16 n.5).

Any rule that punishes public figures for making provocative statements is contrary to the overriding First Amendment principle "that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . . " *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Ninth Circuit focused on quotes from the tapes and did not actually identify any bombastic statements from the published article, making it difficult to determine, as the doctrine would require, whether the incremental reputational harm caused by the defamatory quotes was non-actionable because it was "nominal or non-existent." (Pet. App. A at A-15) (quoting *Herbert*, 781 F.2d at 310-311). Apparently, any public figure who had made provocative, bombastic remarks could be labeled an "intellectual gigolo."

The "incremental harm" doctrine is simply an alternate formulation of the Ninth Circuit's main thesis that a writer may invent quotes to illustrate any character flaw he or she feels a public figure has previously demonstrated. For all the reasons discussed above, this Court must not allow such an interference with free speech. The Court recently acknowledged that the " 'defamer may be [all] the more successful when he baits the hook with truth.' " *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2670, 2698 n.37 (1989) (quoting *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (1966) (en banc)). Under California libel law, "a single

sentence may be the basis for an action in libel even though buried in a much larger text." *Washburn v. Wright*, 261 Cal.App.2d 789, 795, 68 Cal.Rptr. 224, 228 (1968). See also *Baker v. Los Angeles Herald Examiner*, 42 Cal.3d 254, 261, 721 P.2d 87, 91, 228 Cal.Rptr. 206, 209 (1986) *cert. denied*, 107 S.Ct. 880 (1987).

The Ninth Circuit's adoption of the incremental harm doctrine is not only contrary to *Connaughton* and California law, but also clearly conflicts with *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986). As a matter of federal law, the Court rejected the theory:

> because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little good in all of us – or perhaps upon the pessimistic premise that no matter how bad someone is, he can always be worse.
> *Id.*

No matter what Masson actually said, "I was like an intellectual gigolo" caused specific damage to his reputation, damage that he could not have suffered until Malcolm fabricated the quote for publication by the *New Yorker* and Knopf. The Court must act to discourage such fabrications by imposing liability on those who use them to damage reputations and deceive the public.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,
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